The Kroger Co. *and* Anthony W. Toney *and* James D. Leffers *and* International Brotherhood of Teamsters, Local Union No. 528, AFL–CIO[1] *and* George E. Lewis. Cases 10–CA–25549, 10–CA–25552, 10–CA–25581, and 10–CA–25860

July 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 15, 1993, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Kroger Co., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

''(c) Make whole Anthony Toney for any loss of earnings or benefits he may have suffered by reason of the discrimination against him by paying him a sum of money equal to the amount he normally would have earned from the date of the discrimination to the date of the Respondent's offer of reinstatement less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

2. Insert the following as paragraph 2(d) and reletter the remaining paragraphs.

''(d) Make whole George Lewis for any loss of earnings or benefits he may have suffered as a result of the Respondent's removal of Lewis from his regularly assigned duties. Such loss shall be computed consistent with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (1971), with interest as computed in *New Horizons for the Retarded*, supra.''

Ellen K. Hampton and *Ronald B. Ramsey, Esqs.*, for the General Counsel.
John M. Flynn, Esq., of Cincinnatti, Ohio, for the Respondent.
Anthony W. Toney, of Atlanta, Georgia, pro se.
James D. Leffers, of Atlanta, Georgia, pro se.
George E. Lewis, of Atlanta, Georgia, pro se.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Atlanta, Georgia, on June 1, 2, 3, 9, 10, and 11, 1992. The charge in Case 10–CA–25549 was filed by Anthony W. Toney on September 17, 1991.[1] The charge in Case 10–CA–25552 was filed by James D. Leffers on September 16. The charge in Case 10–CA–25581 was filed by Teamsters Local No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America, AFL–CIO (the Union), on October 3, 1991. Finally, the charge in Case 10–CA–25860 was filed by George W. Lewis on March 16, 1992. These charges allege violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), as more fully described below.

On October 8, 1991, a charge was filed by Anthony W. Toney against the Union in Case 10–CB–5865. A consolidated complaint and notice of hearing issued against both Respondent and the Union. The matters raised in Case 10–CB–5865 were resolved by Toney and the Union in a non-Board settlement in April 1992. The charge in Case 10–CB–5865 was withdrawn and the complaint against the Union was dismissed, leaving Kroger as sole Respondent.

The complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by interrogating employees concerning their union activities; threatening employees with discharge and other reprisals; interfering with employee selection of shop stewards; disparately removing ''Teamsters for a Democratic Union'' literature from general purpose bulletin boards; disparately prohibiting employees from talking about the Union; conducting background checks and investigations of employees in retaliation for their union activities; reassigning work from George W. Lewis to other drivers and discharging Anthony W. Toney because of their union activities; and unilaterally restricting access to its offices and to use of telephones and office equipment without notifying the Union or giving it an opportunity to bargain about such matters.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In par. 2(c) of the recommended Order, the judge orders backpay for George Lewis to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Lewis was not discharged but unlawfully removed from his regularly assigned duties, as a result of which ''he lost hundreds of dollars in wages.'' Under these circumstances, backpay for Lewis should be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The recommended Order is modified accordingly.

[1] All dates herein refer to 1991 unless otherwise indicated.

of the charges, its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

Analysis and Conclusion

I. JURISDICTION

The Kroger Co. is a national operator of retail grocery stores. For administrative purposes, it is divided into various ''marketing areas,'' including an Atlanta marketing area comprising Georgia and parts of South Carolina. In the course and conduct of its business operations, Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from points located outside the State of Georgia. Annual gross revenues exceed $500,000.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Teamsters Local No. 528, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Kroger's ''Atlanta marketing area,'' which includes stores throughout Georgia and parts of South Carolina, is serviced by an Atlanta distribution center. This distribution center employs approximately 165 regular full-time truckdrivers and 320 warehouse employees. The distribution center actually includes several separate facilities within Atlanta, including a large dry goods warehouse known as Bouldercrest, a smaller East Point warehouse, another storage facility, a freezer, and a meat distribution facility located in Conyers, Georgia, a suburb of Atlanta. Employees at all of these facilities are represented for purposes of collective bargaining by Teamsters Local No. 528.

B. *June and July 1991: The Union Steward Campaign, Employee Meeting, and Respondent's Interrogation*

Prior to 1991, employees at Respondent's Atlanta distribution center were represented on the job by appointed shop stewards. Over time, a number of employees came to believe that grievances were being ignored and that representation by appointed stewards was inadequate. These employees began to campaign for the replacement of appointed stewards with elected stewards. Early efforts to achieve this goal failed. During 1991, this campaign intensified, and finally on July 14, an election of stewards was held for the first time. Events material to this case arose out of the campaign which surrounded that election.

A day or two prior to June 23, word was spread among drivers that there would be a group meeting of employees in the drivers' breakroom at Respondent's East Point facility on Sunday, June 23. On June 23, about 25 to 30 drivers showed up and attended this meeting, where they discussed common concerns regarding the adequacy of representation and also issues they wanted the Union to bargain for in the next contract negotiations.

When Respondent learned that this meeting had been held, over a period which lasted almost 2 weeks, Respondent's assistant distribution manager, Paul Kemme, and Transportation Manager Randy Johnson called employees one by one into its office and questioned them about the meeting. On or about June 25, employee Anthony Toney was called into Johnson's office. According to Toney, who I credit, Johnson had two thick folders lying on his desk, which appeared to be worklogs and activity sheets going back a considerable period. Johnson first questioned Toney about why Toney had turned in two activity sheets 10 days earlier on June 15. Toney explained that Supervisor Joe Scarborough told him to fill out two activity sheets when Toney agreed to take a run prior to the end of his regular shift bid. Johnson immediately telephoned Scarborough. Scarborough apparently confirmed Toney's representations because as the conversation with Scarborough ensued, Johnson's face reddened and he became angry, eventually slamming down the telephone receiver.

Johnson then began questioning Toney about the June 23 employee meeting. Johnson asked Toney if he had attended the meeting and what had taken place. When Toney told Johnson he had been at the meeting and what had occurred, Johnson accused Toney of employees having held an unauthorized union meeting on company premises.[2] Toney assured Johnson that this had not been a union meeting, but rather that it had simply been a group of drivers getting together to voice their concerns and opinions. I credit Toney that Johnson then stated, ''Didn't you ask me to work here? I didn't ask you, didn't you ask me to work here?'' Toney replied yes—that he had called Johnson several times in order to get the job. Toney also told Johnson that Kroger was a good place to work, but nevertheless ''people have different opinions'' about changes that should be made. I credit Toney that Johnson stated he was going to give everyone at the meeting a ''C.A.,'' a type of written warning.

Also on or about June 25, employee George Lewis was called into Kemme's office at Bouldercrest. Kemme first accused Lewis of attending an ''illegal'' union meeting on company property. Lewis told Kemme that the meeting was

[2] The collective-bargaining agreement between Respondent and the Union authorizes the Union to hold meetings on company property provided it gets Respondent's permission. Kemme testified, however, that Respondent has interpreted this as an obligation to allow such meetings provided the Union gives Respondent notice. The record reflects that the Union has held several meetings on Respondent's premises.

not an illegal meeting, that it was just a meeting of drivers who got together to discuss the proposal which they wanted the Union to present to Respondent in the next contract negotiations. Kemme then told Lewis that Kemme did not like the cartoons which someone had been posting around Respondent's facility. These cartoons were a part of the campaign by rank-and-file drivers to secure a stewards' election. These cartoons frequently depicted then-appointed stewards as ineffectual and/or as being in cahoots with Respondent. Lewis told Kemme he would look into it and see if he could find out who had been putting up these cartoons. Lewis told Kemme that if he found out, he would ask them to stop. Later that same day, Lewis was also called by Johnson into Johnson's office at East Point. Johnson proceeded to tell Lewis that Lewis had attended an ''illegal union meeting.'' Lewis explained to Johnson, as he had to Kemme, that the meeting had not been a union meeting, that there were no union representatives or even stewards at the meeting, and there had been no minutes. Johnson, however, told Lewis that employees who had attended would be disciplined.

Also on or about June 25, employee Raymond Branch was confronted by Kemme and Johnson together in Johnson's office. Also present were two incumbent union stewards, Robert Woods and Chuck Mauer. Branch testified credibly that throughout the meeting both Kemme and Johnson were very upset. Johnson was seated, while Kemme paced back and forth. Branch testified credibly, ''one would ask me a question, the other would cross-examine me before I even had the opportunity to answer the question that was asked of me.'' Branch testified Kemme asked whether he had attended the June 23 meeting. Without waiting for an answer, Kemme told Branch that they had the name of every person who attended, ''and we know exactly what went on, but we want your version of it.'' Branch told Kemme and Johnson about the employee meeting. After Branch described the meeting, Johnson asked Branch what he knew about the cartoons which had been posted around Respondent's facilities, referring to the cartoons about existing stewards. Branch testified credibly that Kemme then stated if he found out who posted those cartoons on the bulletin board, Kemme was ''going to fire the hell out of them.'' Kemme then told Branch that he ''knew there was some hard-nosed union people wanting to make some changes and he understood that.'' Kemme went on to say, however, that Respondent wanted to keep Woods and Mauer as stewards ''because it had taken them a long time to get things the way they were.'' Later that same day, Johnson again spoke to Branch. I credit Branch's testimony that Johnson, like Kemme, stated ''We need to keep two of our stewards. They understood the situation, and we need to keep them.''

Also on or about June 25, Kemme called employee Allen Watkinson[3] and Willie Henderson into Kemme's office at Bouldercrest. This meeting followed the same pattern as the sessions with other employees. Watkinson testified credibly that Kemme told Henderson he could be fired for being on company premises during off-duty time. Kemme told Watkinson that although Kemme could not fire him since he had a run to take out that afternoon, Kemme might give him a ''C.A.,'' a written warning, for attending the meeting and delaying his load. Watkinson testified credibly that Kemme asked whether anybody in particular had called the employee meeting on June 23 and who had spoken at the meeting. Watkinson named two employees, one of whom was George Lewis. Kemme asked if either Ken Hilbish or Branch had spoken. Watkinson replied that everyone present at the meeting spoke at one time or another. Kemme asked what was discussed at the meeting. Watkinson mentioned a number of issues, including retirement, pensions, and how the Company operated. Watkinson testified credibly that Kemme then stated ''in order for the Company to operate properly . . . the company and the Union are in bed together.'' Watkinson testified that as Kemme made this statement, Kemme crossed his index and middle fingers, representing a togetherness. As in the meetings with Lewis and Branch, Kemme asked Watkinson if he knew who was making and/or putting up cartoons about existing stewards. When Watkinson said that he did not know, Kemme replied ''it didn't really matter'' because Kemme ''knew who was doing it.''

Both Johnson and Kemme admitted conducting these interviews with employees and ''trying to find out what happened.'' The sole allegation denied is Watkinson's testimony that Kemme crossed his fingers and told Watkinson that in order for the Company to operate properly, Respondent and the Union were in bed together. While it may seem surprising that an employer representative would actually make such a statement to an employee, it is equally surprising that a company representative would hold a meeting with an employee with incumbent union stewards present and actively campaign on their behalf. I have no trouble crediting Watkinson, a responsive witness who did not hesitate to testify to matters apparently harmful to his interest, such as the fact that he did indeed leave late for his assigned work on June 23 because of the employee meeting. Kemme, on the other hand, attempted to shade the truth to achieve a perceived advantage. Kemme, for example, contended that no disciplinary action whatever had been taken against Watkinson as a result of the June 23 employee meeting. On cross-examination, however, Kemme was confronted with a ''Constructive Advice Record,'' a C.A. or written warning, which had remained in Watkinson's personnel file as ''reduced to verbal warning.'' Kemme continued to try to claim that no disciplinary action had been taken against Watkinson, although a verbal warning is clearly disciplinary. Having considered all the testimony, I credit Watkinson fully regarding his meeting with Kemme on or about June 25 and the remarks made by Kemme during that meeting.

On June 27, employee Ken Hilbish was called into Johnson's office at East Point. Incumbent Union Steward Chuck Mauer was also present. Johnson proceeded to question Hilbish about why drivers held a meeting on June 23, who attended, and what was talked about. Johnson told Hilbish that having such a meeting on company property during off-hours was grounds for termination, but whether terminated or not, Hilbish would at least get a ''C.A.,'' a written warning, for attending the meeting. Johnson then proceeded to question Hilbish about the cartoons posted at Respondent's facility directed at incumbent stewards. Johnson asked Hilbish who had drawn and who had distributed these cartoons. According to Hilbish's credible testimony, Johnson then became

[3] The transcript incorrectly gives Watkinson's name as ''Watkins,'' but he was correctly referred to as Watkinson in later testimony. Counsel for the General Counsel's motion to correct the transcript is hereby granted.

angry, stating, ''This is all a bunch of bull shit.'' Johnson stated that Distribution Manager John Moreau and Assistant Distribution Manager Kemme ''were pissed'' and they wanted to know who was doing those cartoons. Johnson then added that if they could find out who was doing the cartoons, they would be fired.

According to Hilbish, who I credit, Johnson then changed tactics appearing to become more ''mellow.'' Johnson suggested that he and Hilbish ''just talk about this.'' Johnson asked Hilbish why the drivers wanted to change stewards. Hilbish told Johnson that employees wanted more fair treatment, that grievances were often filed and never heard. I credit Hilbish that Johnson replied, ''Well if you want to go by the book, then we can go by the book. But it will be harder on you people then it will on us.'' Johnson then went on to say that regardless of whether there was an election or not, the drivers needed to keep two of the incumbent stewards, Robert Woods and Mauer, because they had done a lot for employees and because ''it took them a long time to get things like they were.'' Hilbish replied somewhat sarcastically, ''I can believe that.''

Sometime in early July, at least 1 week and perhaps as long as 2 weeks after the June 23 meeting, Respondent was still calling employees one by one into its offices and questioning them about the meeting. Employee John Woods testified that Transportation Manager Johnson called him into Johnson's office approximately 2 weeks after that meeting. Woods, like the other employees, was asked who attended the June 23 meeting and what the meeting was about. Woods testified credibly that at the time of this conversation with Johnson, Johnson had a piece of paper listing the names of about 16 drivers who had been present at the meeting on June 23. Woods answered that the meeting was simply a group of drivers getting together to discuss issues. Johnson told Woods that the drivers had violated several articles of the collective-bargaining agreement, including being on company property on off-duty time and going out late on deliveries that day. Woods also testified incredibly that he, like other employees, was asked by Johnson who was preparing and posting the cartoons around Respondent's facility regarding incumbent stewards. Johnson told Woods that Johnson ''had worked too hard to tear down the walls between us'' and Johnson ''wasn't going to allow the walls to be built up again.''

Employee Tim Floyd also testified that he was called into Johnson's office almost 2 weeks after the June 23 meeting. Johnson told Floyd he wanted to talk to him about the June 23 meeting. As Johnson had done in several of the earlier conversations, Johnson told Floyd that this employee meeting had been ''illegal.'' Floyd testified credibly that Johnson then stated, ''I have a list of the names of the people that were present. Would you like to add to it?'' Floyd refused. Finally, Johnson told Floyd that as a result of this meeting, Johnson was ''going to have to issue some discipline.'' It is not completely clear whether it was in this same conversation with Johnson or another conversation at about that same time, but Floyd testified that in a conversation with Johnson, Johnson told Floyd the employees should really consider keeping incumbent Stewards Robert Woods and Chuck Mauer because of all the ''personal time and money'' they spent doing things for the drivers. Soon after the election, at which time Mauer was voted out of office, Johnson told Floyd that Johnson thought employees ''had messed up by not keeping Chuck [Mauer].''

Virtually all of the testimony from employee witnesses concerning their conversations with Assistant Distribution Manager Kemme and Transportation Manager Johnson stands undenied. In fact, Kemme and Johnson both admit questioning employees about the June 23 meeting. Where there is a direct conflict in testimony between Watkinson and Kemme, I have credited Watkinson. Respondent argues that its interrogation of employees about the June 23 meeting occurred because on that same day there was a major theft of frozen shrimp at Respondent's freezer facility located approximately a mile and a half from the East Point facility where drivers had gathered. Respondent argues that employees were interrogated about the June 23 meeting because ''Kemme and Johnson were concerned about the theft.'' Transportation Manager Johnson admitted, however, that employees involved in this theft ''were caught in the act'' and there was no further investigation necessary. Moreover, it is undisputed that it was a supervisor and employees at the freezer, not drivers, who were involved.

Next, Respondent relies on the contractual provision which gives the Union the right to hold union meetings with employees on company premises providing the Union first notifies Respondent. Respondent claims that some employees related at the outset this was a ''union meeting'' on June 23. I do not credit such a claim. In fact, every employee witness testified credibly that it was Johnson and Kemme who attempted to characterize the June 23 meeting as a ''union meeting.'' Employees repeatedly told Kemme and Johnson time and time again that the meeting was not a union meeting but rather was an informal meeting of concerned drivers.

Finally, Respondent relies upon a ''shop rule'' which provides that ''employees will be allowed on the premises only during their respective working hours. Employees, when finished work, shall leave the premises.'' Thus, in its posttrial brief, Respondent argues that the interrogation of employees ''was simply a natural consequence of the unauthorized use of company premises by employees who had no legitimate reason for being there in the first place.'' Further, Respondent argues, ''any alleged coercion is readily dispelled because no employees were disciplined.'' As I have indicated, both Kemme and Johnson acknowledged that union meetings can be, and have been, conducted on company premises. Kemme admitted it is his understanding that Respondent has an obligation to agree to union meetings which the Union may request so long as the meeting does not interfere with work. The record reflects that on June 22, the day before the meeting, employee Raymond Branch asked Supervisor Sims Harris if employees could use an upstairs executive conference room for a meeting the next day. Harris denied Branch permission. Respondent's actions suggest disparate enforcement of a shop rule in order to deny dissident employees the opportunity to mobilize.

Drivers freely enter the premises an hour or more before their scheduled start time and often remain an hour or more after their work is finished. Further, employees come onto Respondent's premises on their off days for a variety of personal reasons ranging from selling items to other employees or supervisors, to simply getting together to socialize with friends in the employee breakroom. It is particularly common for large groups of off-duty employees to congregate and so-

cialize in the employee breakroom on paydays, when drivers pick up their checks. On such occasions, off-duty employees remain and socialize in the breakroom, in the presence of and with supervisors. Since both union meetings and informal unauthorized gatherings of employees to socialize have been routinely permitted on company premises, the concern which caused Respondent to interrogate employees about the June 23 gathering had little or nothing to do with the uniform and legitimate enforcement of any work rule, but rather with the content of the meeting itself. Even if there was a legitimate concern about the meeting, Respondent clearly had that concern answered after questioning only one or two employees about the meeting. Having learned its purpose and content, Respondent was put on notice that the meeting constituted protected concerted activity. Continuing to interrogate employee after employee served only one purpose, to coerce employees through the interrogation itself and through the threats of discipline made to employees.

What is apparent is that as soon as Respondent learned the purpose and content of the meeting, it became concerned that these employees could disrupt a working relationship with the Union which Respondent had come to view as cosy. Thus, in the later sessions with employees, Respondent even had existing union stewards present while the interrogation was being conducted. With stewards present, Respondent proceeded to interrogate employees about who it was that was drawing and posting cartoons around Respondent's facility which challenged the cosy relationship between existing stewards and management. Not only did Respondent interrogate employees about such matters, it went on to campaign on behalf of keeping existing stewards and repeatedly threatened that it would fire whoever it was that was posting these cartoons. There can be little doubt that Respondent's interrogation of employees, and threats of discipline and discharge for participating in the June 23 meeting, and for participating in other protected activity such as distributing cartoons questioning the relationship between stewards and management meet the standard of coercive conduct as set forth in *Rossmore House*, 269 NLRB 1176 (1984). I find that Respondent's summoning of employees to management offices to interrogate them about concerted activity, threaten them with discharge and written warnings, threatening to discharge employees for posting cartoons challenging the relationship between existing stewards and management, and issuing discipline to employees for engaging in such activity all violate Section 8(a)(1) of the Act.[4] *Taylor Chair Co.*, 292 NLRB 658 (1989).

C. *July 14: New Stewards Elected*

Employees Ken Hilbish and Anthony Toney were instrumental in finally securing an election of union stewards on July 14. This was accomplished in large part by Toney, and to a lesser degree by Hilbish, securing more than 100 employee signatures on a petition directed to the Union demanding an election of stewards. When the election was finally conducted on July 14, five of seven existing stewards were replaced. Only existing stewards Woods and Reed were retained. Chuck Mauer, one of two for whom Respondent actively campaigned, was replaced.

D. *Events Following Election of New Stewards*

1. July to September 1991: Background checks of employees

Respondent is subject to various Department of Transportation (DOT) regulations which require that certain records be kept regarding a driver's background and driving record. For many years, Respondent has employed the Van Ella firm to perform background checks on new drivers and provide Respondent with a written report. In early 1990, Supervisor Joe Scarborough was promoted and charged with updating these background files after it had been learned that various files were out of place or missing required information. Transportation Manager Randy Johnson assigned Scarborough to review the contents of each existing file and to note what was missing while transferring the contents into new file folders which contained a checklist of DOT required documents.[5] On September 11, 1990, Supervisor Scarborough sent a memo to Respondent's human resources department in Nashville, Tennessee, listing 23 drivers for whom he needed Van Ella reports. Six months later, the reports still had not been received, so on March 6, 1991, Scarborough resubmitted the request with additional names of drivers hired during the past 6 months. One of those additional names was that of Anthony Toney, hired November 12, 1990.

By mid-July 1991, Respondent had still not received the background checks requested in March. On July 17, 1991, only 3 days after Respondent's employees elected a new slate of union stewards, Human Resources Manager John Wagner telephoned the Van Ella firm and arranged for Respondent's Atlanta distribution center to order reports on its drivers directly from Van Ella, rather than going through Respondent's Nashville human resources office, as it had done prior to that date. Wagner went even further with Van Ella and reached an agreement so that from then on, the Atlanta distribution center would fax copies of employment applications for background checks, while Van Ella in turn would respond verbally within 3 working days. Hard copies of the Van Ella report would then be mailed directly to Atlanta Distribution Center Manager John Moreau.

Supervisor Scarborough admitted that when he was assigned the task of updating employees' files, the only stated purpose was to complete these files. Nothing was said about taking any action or reviewing any employees' qualifications for employment. As soon as Respondent began to receive the Van Ella Reports after the election of new union stewards, however, Respondent began to carefully scrutinize these re-

[4] Although not specifically alleged in the complaint, I find that the issuing of discipline to Watkinson for participating in the June 23 meeting violated Sec. 8(a)(1) of the Act. It is like and related to other allegations in the complaint that employees were interrogated and threatened as a result of this concerted activity meeting held on June 23. Respondent's assertion that Watkinson was not disciplined because the written warning was reduced to a verbal warning is altogether bogus. Discipline is discipline, whether in written form or as a verbal warning. I find that such discipline violated Sec. 8(a)(1) of the Act.

[5] All parties agree DOT regulations require that within 30 days of employment, the motor carrier must make an ''investigation'' of the driver's prior employment for the previous 3 years. This fact is important in my findings regarding the discharge of Anthony Toney, discussed below.

ports and utilize them for far more than simply completing employees' personnel files. Within about a week after being elected as a shop steward, employee Ken Hilbish learned that Respondent was investigating his employment background, not just his driving record. Hilbish learned that Respondent was investigating the circumstances under which he left a previous employer, Brown Transport. Hilbish confronted Transportation Manager Randy Johnson, who admitted he viewed the circumstances as suspicious because Hilbish had written on his job application that he ''left'' Brown, rather than saying he quit or was fired. I credit Hilbish that Johnson told him Respondent was ''checking into your history.'' In the end, Hilbish showed Johnson that although he had been fired by Brown, he had been reinstated and the record of the discharge expunged pursuant to a Board order. The matter was then dropped by Johnson. The significance of this, however, is that immediately after the election of new union stewards, Respondent began to subject certain employees to minute scrutiny.

As is more fully discussed below, Respondent proceeded with an effort to terminate three other activists, David Leffers, Eddie Wyche, and Anthony Toney. All three had been active in supporting stronger representation and securing new union stewards. There is only one event which explains Respondent's sudden sense of urgency in receiving the Van Ella reports, and that is the election of new shop stewards on Sunday, July 14. Respondent was notified of the change in stewards, including the election of Ken Hilbish, by written notice dated Monday, July 15. On either July 16 or 17, the decision was made and action was taken to obtain the Van Ella reports of Atlanta distribution center employees directly, rather than follow previous procedures. Respondent offers no explanation or business justification for the sudden urgency in receiving these reports. In its posttrial brief, Respondent simply argues the practice of receiving these reports had been initiated and maintained long before the election of new stewards, thereby simply trying to avoid the real issue. In fact, the rapidity and efficiency of the arrangements made immediately after the election of new union stewards stand in sharp contrast to the wholly lackadaisical attitude of Respondent toward receiving the background checks up to that point. I find as alleged in the complaint that Respondent instituted these new procedures for background checks in retaliation against employees for electing new and more active union stewards in violation of Section 8(a)(1) and (3) of the Act.

2. July 31: Conversation between Transportation Manager Johnson and employees Hilbish and Toney

On or about July 31, newly elected Union Steward Ken Hilbish and employee Anthony Toney went to Transportation Manager Johnson's office to discuss a potential grievance by Toney regarding the failure to assign certain work to employees on the extra board. As was his practice, Hilbish first attempted to resolve the matter without filing a written grievance. When this proved unsuccessful, Hilbish reduced the grievance to writing and gave it to Johnson.

When Hilbish and Toney presented Johnson with the written grievance, Johnson became irate. Johnson told Hilbish and Toney that ''he could do what he wanted to do as far as changing people's schedule.'' Johnson then threw the written grievance down on the desk, kicked the desk, slamming the desk drawer, and asked Hilbish and Toney, ''Do you have any more piddely ass shit you want to file?'' Employee Anthony Toney then became angry as well. As a result, Hilbish asked Toney to leave Johnson's office, and Toney did so. As Toney left, Supervisor Dan Casteel came into Johnson's office. I credit Hilbish that Johnson then said to Casteel about Toney, ''His ass is back in here blowing off at the mouth again wanting something for nothing. I will be glad when he is gone from here.''

To the extent Johnson's testimony may be considered as a denial of this incident, I do not credit Johnson. Most of Hilbish's and Toney's testimony regarding this conversation is undenied. During Johnson's testimony, Johnson was asked whether he said to Toney that he would be glad when Toney was gone. Johnson denied making such a statement. This was not, however, what was testified to by Hilbish. Casteel testified that he could no longer ''really recall'' the incident and that he could ''not recall'' Johnson saying he would be glad when Toney was gone. Casteel's testimony is hardly a credible or even substantive denial. Hilbish and Toney, on the other hand, testified credibly regarding this incident. I specifically credit Hilbish regarding the statement made by Johnson that he would be glad when Toney was gone. I find that this statement constitutes an implied threat of discharge in violation of Section 8(a)(1) of the Act.

3. August 16: Conversation between Assistant Distribution Manager Kemme and employee David Leffers

Sometime during the first 2 weeks in August 1991, employee David Leffers undertook a physical examination required by DOT regulations. Upon completing the physical, Leffers claimed 3-3/4 hours' pay for time spent traveling to the physical, taking it, and returning from the clinic. Leffers' claim was denied by Respondent.

On or about August 16, Leffers pursued his claim, based on his interpretation of the collective-bargaining agreement, by filing a grievance. Shortly thereafter, Leffers went into Assistant Distribution Manager Kemme's office to discuss the matter informally. Leffers and Kemme engaged in a lengthy discussion, during which they were joined first by Transportation Manager Johnson and then by Supervisor Dan Casteel.

Kemme explained Respondent's position that the contract language being relied on by Leffers was intended only to compensate drivers for unnecessary delays at the clinic or related facility where the physical examination was conducted, but not for travel time to and from that facility. Kemme stated that if the physical examination ran over 1-1/2 hours, employees would be paid for actual time at the clinic, but not for travel time. Leffers disagreed. I credit Leffers that at that point in the conversation, Kemme told Leffers, ''Well, if you're going to force us to pay this, then what I am going to start doing is scheduling off duty drivers on their off days to come in and take physicals so that the Company won't be charged with that delay time, and I don't think your buddies out there will like that very much.'' Leffers admittedly became angry and walked out of the meeting.

Leffers pursued his grievance, which was later settled.

Kemme did not deny threatening Leffers that if he pursued and won his grievance, Respondent was going to start scheduling drivers to take physical exams on their off days. In its

posttrial brief, Respondent argues that Kemme did not threaten reprisal, that ''he merely pointed out the other side of the argument.'' Pointing out the other side of the argument is what Kemme did when he explained Respondent's interpretation of the collective-bargaining agreement. But when Kemme threatened to change existing practice specifically in order to inconvenience employees, Kemme was clearly threatening reprisal. It is obvious that Kemme himself realized he was threatening reprisal for he went on to chide Leffers that ''I don't think your buddies out there will like it very much.'' The record reflects that Kemme made a similar statement to newly elected Union Steward Ken Hilbish during a grievance meeting. It was only when Hilbish countered by pointing out the contractual provision which would then require Respondent to pay employees called in on their day off for 4 hours' pay that Kemme backed away from his threat. This, however, does not change the fact that Kemme threatened reprisal against employees in response to Leffers' grievance. I find that by doing so, Respondent violated 8(a)(1) of the Act.

4. August 1991: Prohibition of talk about the Union

Ken Hilbish testified without contradiction that during the months of August and September 1991, not long after he was elected union steward, supervisors repeatedly approached him when they saw him talking to other drivers on the loading dock, telling Hilbish and whoever he was talking to that they needed ''to break up the unauthorized union meeting and get to work.''

From Hilbish's uncontradicted testimony, it appears that this pattern began about 2 weeks after Hilbish was elected steward. Hilbish overheard Supervisor Sims Harris tell newly appointed Supervisor Larry Dreiser, who Harris was training, that Dreiser should watch Hilbish because Hilbish was ''a troublemaker.'' Dreiser responded, ''I'll take note of that.''

Within a week or two of the conversation between Harris and Dreiser, Dreiser approached Hilbish as Hilbish was talking to another employee on the loading dock. Dreiser told Hilbish, ''You all need to break up the union meeting and get to work.'' In September, Dreiser again approached Hilbish as he spoke with other employees, and again told them, ''You need to break up that unauthorized union meeting.'' During the same period of time, Supervisor Gary Rampey also approached Hilbish as Hilbish spoke to fellow employees. Rampey, like Dreiser, told Hilbish that he needed to ''break up the unauthorized union meeting'' and get back to work. In fact, according to Hilbish's uncontradicted and credible testimony, Rampey told Hilbish, ''You and your outlaw sessions are going to get some people in trouble around here.''

None of the statements described above are denied by Harris, Dreiser, or Rampey. The record is replete with evidence that informal conversations between drivers at and on the loading dock were the accepted norm rather than the exception. The only explanation or defense offered by Respondent in Respondent's posttrial brief for interfering in these conversations is that telling employees to break up their union meetings and go back to work ''hardly seems coercive in view of the amount of working time apparently spent in such discussions.'' This argument, however, begs the question, because there is no evidence whatever that Respondent made it a general practice of interfering with informal conversations between drivers in order to tell them to get to work. In fact, the content of these statements made by Harris, Dreiser, and Rampey show perfectly clearly that it was the perceived or actual subject matter of the conversations, not the conversation as such, which was being targeted. I agree with counsel for the General Counsel the record adequately establishes that Respondent was engaged in a disparate prohibition of talk concerning the Union and work-related matters, while other general conversation was allowed. Such a disparate prohibition violated Section 8(a)(1) of the Act, and I so find.

5. August 23: Unilateral change regarding use of the copy machine and telephones

On August 23, 1991, Assistant Distribution Manager Paul Kemme posted a notice to employees prohibiting them access to the copy machine and telephones in the office at Respondent's distribution center. On the same day, Respondent mailed a copy of the notice to the Union. It is undisputed that prior to August 23, drivers were permitted free access to the office to use both the copy machine and telephones.

The only evidence that Respondent's action was unilateral came from the testimony of Union Steward Ken Hilbish, who testified that he was never notified or given an opportunity to bargain prior to the notice being posted to employees. Hilbish also testified that Business Agent Ed Flournoy told Hilbish he had received no notice of this change except the copy of the notice mailed on the date it was posted to employees. This testimony by Hilbish is clearly hearsay, and I will not rely on it to make such a finding. Flournoy was not called as a witness by counsel for the General Counsel.

Assistant Distribution Manager Kemme testified Union Steward James Webb reported that drivers were complaining other drivers were going through their trip sheets, contained in the office. Kemme testified he spoke to Union Business Agent Flournoy more than once regarding misuse of the office, telephones, and complaints from drivers regarding other employees going through their files and payroll records. According to Kemme, Flournoy agreed with Kemme that the contract covered such matters. Indeed, ''Shop Rule'' No. 10 provides, ''There shall be no unauthorized use of the telephone, facilities and equipment of the employer.'' According to Kemme, he assured Flournoy that in an emergency, employees would still be allowed to use a telephone in the office. Kemme then posted the notice to employees, mailing a copy to Flournoy.

Counsel for the General Counsel argues that ''the conclusionary and vague testimony of Paul Kemme designed to imply, without actually stating, that there was notification and bargaining must be discounted.'' I disagree. The burden of proof is on counsel for the General Counsel. The burden does not shift to Respondent as a result of counsel for the General Counsel introducing unreliable hearsay testimony. This is particularly true where, as here, a specific existing contractual shop rule implies on its face that the employer has the right to authorize or restrict use of the telephone, facilities, and other equipment. I find that counsel for the General Counsel has failed to carry its burden of proof on this issue, and I shall dismiss this allegation from the complaint.

6. September 4: The attempted discharge of David Leffers and Eddie Wyche

As I have found above, Respondent hurried background checks of employees immediately after, and as a result of, employees electing new union shop stewards who were less to Respondent's liking than previous stewards. In addition, Respondent used these hurriedly acquired background checks to question the employment qualifications of some employees. The questioning of Union Steward Hilbish's qualifications is described above.

On September 4, Transportation Manager Johnson and Assistant Distribution Manager Kemme expressed an intent to terminate employee David Leffers because of the alleged falsification of his employment application by stating that he had never been convicted of a crime.

When Union Steward Hilbish learned of Respondent's intention to discharge Leffers, he immediately began an investigation. Hilbish learned from Leffers that Leffers had been convicted of a crime when Leffers was 17 years old pursuant to the Youthful Offenders Act, which expunges the conviction from the individual's record upon reaching adulthood provided the individual maintains a clean record. Only when it was pointed out to Respondent that Leffers' conviction was pursuant to the Youthful Offenders Act, and his record had been expunged, did Respondent back off its assertion that Leffers had falsified his employment application.

Later in the day on September 4, Kemme called Leffers into Kemme's office, telling Leffers that it was to ''ease his mind'' regarding the termination. Leffers testified credibly that during this conversation with Kemme, after telling Leffers that he would not be discharged after all, Kemme went on to issue a warning to Leffers. Leffers testified credibly that Kemme stated:

> ''I want to give you some advice because I like you,'' he said, ''I think you're a good guy and all.'' He said, ''But, you need to back off and get out of this Union thing—and just basically get out from under the spotlight.'' He said, ''I've given this advice to several other people and they haven't listened to me,'' and he said, ''I hate to see you lose your job over it.''

Kemme not only does not deny issuing this warning to Leffers, he admits he told a number of drivers to get out of the limelight, including Anthony Toney, as more fully described below. I credit Leffers completely. There can be no question whatever that Kemme was threatening Leffers with possible reprisal, including discharge, if Leffers remained a union activist, and by doing so Respondent violated Section 8(a)(1) of the Act.

Also on September 4, Respondent expressed an intent to terminate employee Eddie Wyche, also for allegedly falsifying his employment application by stating that he had never been convicted of a crime. Union Steward Hilbish began an immediate investigation of Wyche's situation. Hilbish learned from Wyche that he, too, had been convicted of a crime pursuant to the Youthful Offenders Act, and that his conviction had also been expunged. When this was brought to Respondent's attention, Respondent was forced to back off its intention to discharge Wyche as well.

Although Respondent did not carry through with the discharge of Leffers or Wyche, I find that its stated intention to discharge them, as well as Kemme's threats to Leffers were all undertaken with an unlawful motive as retaliation against employees for engaging in protected activities, and all violated Section 8(a)(1) of the Act. Further, Respondent's actions amply support a finding that the hurried receipt of Van Ella reports, and their use, were for an unlawful purpose of Respondent trying to rid itself of certain particularly active union reformists.

7. September 4: Discharge of Anthony Toney

Anthony Toney and Ken Hilbish knew one another before Toney was hired by Respondent. Sometime in early 1990, Toney mentioned to Hilbish that he would like to get a better job than he had at the time. Hilbish, who already worked for Respondent, told Toney that Kroger was a good place to work, and encouraged Toney to apply. Toney replied that he did not think he could be hired by Respondent because he had a DUI (driving-under-the-influence) traffic violation that would show on his record. All parties agree that D.O.T. regulations require employers of over-the-road drivers to investigate the driving records of new employees for the past 3 years. Usually this is done through prospective employees providing, and employers independently obtaining, a M.V.R. (motor vehicle report) from the driver's state Department of Motor Vehicles. Hilbish told Toney that he had been hired by Respondent in 1989 on the basis of a 3-year M.V.R. and that this was what Toney would need to submit to Respondent with his application. Hilbish suggested that Toney wait until the DUI would no longer appear on a 3-year M.V.R., and then apply for work with Respondent.

In August 1990, Hilbish's wife had a birthday party for Hilbish at their home, and Toney was invited. While there, the subject of employment at Kroger came up again, and Hilbish gave Toney an application. Hilbish told Toney to fill out the application and to get a current 3-year M.V.R. Toney did so, and returned both the application and the M.V.R. to Hilbish. This M.V.R. submitted by Toney is now alleged by Respondent to have been altered or ''doctored,'' and is the fact which Respondent now relies on to support its decision to discharge Toney. This M.V.R. is discussed at length below. I find the credible testimony of Toney, Hilbish, and Hilbish's wife significant, however, in that it convinces me Toney returned the completed application and the M.V.R. to Hilbish. It was then Hilbish who, in turn, took the application and M.V.R. directly to Transportation Manager Randy Johnson. Hilbish gave Johnson the application, telling Johnson that Toney was a good worker and a safe driver with no commercial or personal vehicle accidents.

In September, Toney arranged to meet Johnson personally, and thereafter called Johnson regularly asking about job openings with Respondent. Finally, Johnson interviewed Toney personally. I credit Toney that during their interview, Johnson had Toney's application and M.V.R. in front of him while they talked. I also credit Toney that Johnson offered Toney a job with Respondent that day, but since Toney had to give notice to his current employer, they agreed on a reporting date of November 12, 1990. I do not credit Johnson that during this interview, or at any other time, he told Toney that Toney would have to provide a 7-year M.V.R. I find that a 3-year M.V.R. was already in front of Johnson, and that the subject of another M.V.R. was never raised either

during this interview or during any of the telephone conversations which preceded it.

Toney reported for work as scheduled on November 12, 1990. At the time he was hired, one of the documents Toney was asked to complete was a ''Motor Vehicle Driver's Certification'' listing traffic violations over the past 12 months. On this certification, Toney listed two traffic tickets he had not listed on his original application since they had not appeared on his M.V.R. at the time. As the issue of Toney's discharge is analyzed, it is important to keep in mind that all parties and all witnesses agree it is common and accepted practice, regardless of the basic honesty or dishonesty involved, for drivers to acknowledge only those traffic violations and citations which they know appear on an official M.V.R. issued by a State's Department of Motor Vehicles. Further evidence of this, and its implications, are discussed in greater detail below. Before reporting to work for Respondent, Toney obtained another more recent 3-year M.V.R. to see if the two other tickets he knew he had received had been entered into the Department of Motor Vehicle's computer. Since these two additional ticket did show on the later M.V.R., Toney acknowledged and listed them on the ''driver's certification'' completed on November 12. When Toney was hired, nothing was said about the inconsistencies between his application and his ''Driver's Certification,'' or about his failure to report on his application two of the three tickets he knew he had at that time but which did not yet appear on his official M.V.R. Toney was put to work. Thereafter, he successfully completed his probationary period of 30 dispatches, which took approximately 50 to 60 calendar days.

During 1991, Toney joined with the group of employees who pressed for elected, rather than appointed, union stewards. Toney became particularly active in that campaign. During June 1991, Toney was working a ''yard bid'' at both the Bouldercrest and East Point facilities, shuttling trailers in the yards. In this job, Toney had an opportunity to see most of the drivers at one time or another. Hilbish prepared a petition for employee signatures calling for an election of shop stewards. After getting seven signatures on the petition, Hilbish turned it over to Toney. For the next 10 days to 2 weeks, Toney openly solicited employee signatures on this petition both while working in the yard and while in the employee breakroom. Toney obtained approximately 90 signatures on the petition. I credit Toney that he was observed in this activity by a number of supervisors and managers, including Transportation Manager Randy Johnson and Supervisors Gary Rampey and Joe Scarborough.

Toney was especially forceful in ensuring that employees received notice of the shop steward election held on July 14. Toney went to the union hall, demanded a copy of the election notice from Business Agent Ed Flournoy, then at his own expense made and distributed copies of that notice to fellow employees at work. Toney also went personally to Assistant Distribution Manager Paul Kemme and asked Kemme to issue a memo to all drivers letting them know they were free to go and vote in the steward election. I credit Toney's testimony that after agreeing to issue the memo, Kemme told Toney, ''but you don't have enough whiskers to be doing what you're doing.'' In the context of Toney's recent union activities and his purpose in approaching Kemme, there is no questions whatever that Kemme was warning Toney away from being so active in union matters in view of his relative lack of seniority.

After the shop steward election on July 14, and until the time of his discharge in September, Toney remained one of the most active proponents of stronger representation. As I have found above, flyers and cartoons questioning the existing relationship between Respondent and incumbent union stewards continued to appear around Respondent's facilities, and continued to be posted on employee bulletin boards. Transportation Manager Randy Johnson admitted that, in his view, these cartoons created a disturbance among employees. Assistant Distribution Manager Paul Kemme admitted that, in his view, these cartoons were creating ''quite a disturbance.'' The record reflects quite clearly that both Johnson and Kemme suspected Toney of creating and posting these cartoons. In fact, as cartoons and literature were torn down or removed by management from employee bulletin boards, a fact which Respondent admits, Toney would replace them with new copies.

In late July or early August 1991, Supervisor Gary Rampey spoke to employee Tim Floyd about management's suspicion that Toney was responsible for the cartoons. Floyd testified credibly that Supervisor Rampey told him, ''You know the cartoons got started up again. . . . Randy [Johnson] and Paul [Kemme] are really upset about this . . . and, when they catch the guy putting them up, its going to be his job.'' Floyd asked, ''Do they know who it is?'' It is undenied that Rampey replied, ''They think its Toney.''

Ken Hilbish testified credibly that also during August, Supervisor Rampey told him that Respondent was pretty sure Toney was the one responsible for the cartoons. Rampey explained his logic to Hilbish, ''Toney was the only one working on a Sunday and at 6:00 a.m. cartoons were every.'' Rampey also noted, ''A cartoon had also been left in the copying machine after Toney was there.'' Rampey finalized, saying, ''All evidence points to him being the one.''

Near the end of July or the first part of August 1991, Toney learned from a former employer that a background check was being conducted on him by Respondent. Toney went to Assistant Distribution Manager Kemme to question why this was being done long after his probationary period had expired. Toney told Kemme he believed that Transportation Manager Johnson was trying to find a reason to fire him. Toney described how angry Johnson had become over the grievance he had filed on July 31, discussed above. I credit Toney that Kemme then told Toney if Toney had a problem, he could come directly to Kemme, adding, ''but Toney, you need to get out of the limelight and back off.'' Kemme admits telling Toney he should ''get out of the limelight,'' but claims this advice was not related to Toney's union activities. Kemme even claimed that he was totally unaware Toney was in any way involved in circulating the employee petition, literature, or cartoons. I found Kemme's claims altogether incredible. Kemme attempted a convoluted explanation that what he suggested to Toney was that Toney change jobs since he appeared to be unhappy at Kroger. It is clear to me, however, that Kemme was referring to Toney's union activities, urging him to back off from the ac-

tive role he had taken.[6] The intended message in Kemme's comment to Toney that he should ''get out of the limelight'' is shown not only by the context of that conversation, but also by the context of similar comments by Kemme to other employees, including the statement by Kemme to Leffers on September 4, the very day Toney was fired, ''You need to backoff and get out of this union thing—and just basically get out from under the spotlight. I've given this advice to several other people and they haven't listened to me. I hate to see you lose your job over it.'' I find that Kemme's statement to Toney, like his statement to Leffers, warned employees to cease engaging in union and concerted activities in violation of Section 8(a)(1) of the Act.

As noted and discussed above, Respondent made the decision to terminate Leffers, Wyche, and Toney all on September 4, and advised Union Steward Ken Hilbish of that decision that day. As also discussed, Hilbish was able to convince Respondent that it had no grounds for discharging Leffers and Wyche since their criminal violations occurred when they were minors and had been expunged from their records. In the case of Toney it is important to note that when Respondent advised Hilbish on September 4 of its decision to discharge Toney, Respondent stated as the reason that Toney, like Leffers and Wyche, had allegedly lied on his employment application.

Respondent's claim that Toney altered or ''doctored'' a M.V.R., the ground on which Respondent now relies, was not raised until the following day, September 5. Transportation Manager Johnson admitted, and Respondent in its posttrial brief acknowledges, that Johnson had a supervisor obtain an official 9-year M.V.R. from the State of Georgia on September 5. It is quite apparent that when Respondent notified Hilbish on September 4 of the decision to terminate Leffers, Wyche, and Toney for the same reason, i.e., falsification of the employment application, Respondent was intentionally building a case of consistency. When it was forced to withdraw the decision to discharge Leffers and Wyche, Respondent shifted its asserted reason on September 5 for discharging Toney from the alleged falsification of his employment application to the alleged doctoring of an M.V.R. Whether this M.V.R. was in fact ''doctored'' by Toney is discussed at length below. What is significant at this point is that Respondent shifted its asserted reason for discharging Toney after the decision had already been made to terminate him.

In short, counsel for the General Counsel has presented a convincing prima facie case that Toney's union activities played a substantial part in Respondent's decision to discharge Toney. Counsel for the General Counsel has clearly met its burden of proof described in *Wright Line*, 251 NLRB 1083 (1980). In 1991, Toney joined with other employees who desired stronger union representation, including the election of union stewards. Toney openly and actively solicited employee signatures on a petition demanding an election of stewards. Toney also became active in the campaign to unseat existing appointed stewards by distributing literature and cartoons around Respondent's facility questioning the existing relationship between Respondent and the Union. Transportation Manager Johnson and Assistant Distribution Manager Kemme both admitted that in their view such cartoons created a significant ''disturbance'' among employees. Kemme warned Toney and other employees that they should ''get out of the limelight'' and ''back off'' such union activities. As I have found above, in retaliation against employees for this campaign, beginning in mid-July Respondent placed a new and greater emphasis on securing long-overdue Van Ella driving records of current employees. Part-and-parcel of that retaliatory response, Respondent began background checks of the employment history of current employees, which it had not previously anticipated doing. As a part of that program, Respondent made a decision on September 4, 1991, to discharge employees Leffers, Wyche, and Toney.

Pursuant to *Wright Line*, the burden shifts to Respondent to prove that even in the absence of the unlawful motive, Respondent would have discharged Toney in any event. It is at this juncture that Respondent's claim of the ''doctored'' M.V.R. requires further scrutiny. As one of its last witnesses, Respondent called Tina Snyder, who lived with Toney for about 6 months preceding September 1990, and who testified she saw Toney actually alter the M.V.R. in question before giving it to Respondent. Snyder testified that Toney sat at the table in their apartment, cut up, and then reassembled an official M.V.R. in order to remove certain traffic violations before applying for work with Respondent. Snyder testified that she and Toney then went to a copy machine that made ''rough copies'' so that ''nobody would be able to tell he had doctored his motor vehicle record.'' Snyder testified that after making this ''rough'' M.V.R., she then went with Toney to Kroger and sat in the truck while Toney submitted his application and M.V.R. to Respondent.

I found Snyder less than credible for numerous reasons. Snyder's testimony and demeanor showed her to be angry and spiteful toward Toney because Toney had been seeing another woman, his ex-wife, even during the short time Toney and Snyder were living together. Snyder admitted that even during their brief relationship, she and Toney did not get along well. Next, Snyder's claim that she and Toney went to a copy machine that made ''rough copies'' sounds too good to be true. Snyder's testimony drips of embellishment. In Snyder's effort to tell what she thought would sound like a logical story, Snyder claimed that she rode with Toney to Kroger while Toney delivered his employment application and the ''doctored'' M.V.R. Snyder's testimony is directly contradicted by credible testimony not only of Toney, but Ken Hilbish and even Hilbish's wife. All three testified credibly that Toney brought his completed employment application to Hilbish's house and gave it to Hilbish's wife, who, in turn, gave it to Hilbish, who then delivered it personally to Respondent. I credit their testimony.

A logical argument might be constructed that Toney gave his employment application and one M.V.R. to Hilbish, while he delivered a second ''doctored'' 7-year M.V.R. to Respondent directly. That, however, is not the testimony of any witness. Moreover, such a conclusion is directly contradicted by the testimony of Transportation Manager Randy Johnson himself. Johnson specifically testified that only one

[6] I note too the credible testimony of employee Raymond Branch who testified that Kemme once told him Toney was ''pushing this union stuff too hard, he needs to back off to this stuff.'' On another occasion, 2 or 3 weeks prior to Toney's discharge, which would have been shortly after Toney approached Kemme, Kemme again stated to Branch, ''Mr. Toney doesn't have the whiskers to push this union issue like he—he's pushing too hard; he needs to backup, backoff.''

M.V.R. was ever turned in by Toney, and this was the one with Toney's employment application. Nevertheless, Johnson also points to the numerous telephone calls from Toney seeking employment. Johnson claimed that during one of these calls, he told Toney to submit a 7-year M.V.R., and that this is what Toney did. Johnson, however, failed to provide even an estimate as to the date of this alleged instruction. Further, Johnson gave no context whatsoever as to how it allegedly came up.

All in all, Johnson's testimony was not particularly reliable on the issue of Toney's application. As indicated, Johnson claimed he told Toney that Toney would have to submit a 7-year M.V.R. When asked by counsel why he did this, Johnson replied that it was Kroger standard procedure to require prospective employees to submit 7-year M.V.R. Further analysis, however, reveals that Respondent really had no standard procedure in this regard. On further questioning, Johnson admitted that DOT regulations require only a 3-year M.V.R. for investigation. One might argue that Respondent was simply more cautious and more careful than meeting minimum DOT requirements in hiring drivers with particularly exemplary driving records. The evidence here, however, shows that Respondent was hardly concerned with employing only drivers with exemplary records, as more fully discussed below. Johnson claimed that he had reviewed 52 records of employees hired between 1986 and 1990 who are still employed, and he found only two hired on the basis of a 3-year M.V.R. In fact, the evidence submitted by Respondent shows that at least five employees, in addition to Toney, were hired on the basis of 3-year M.V.R. Respondent's records corroborate the testimony of Union Steward Ken Hilbish that he was one of these employees hired on the basis of a 3-year M.V.R. Clearly, Hilbish had no reason to believe that Toney would need anything other than a 3-year M.V.R., and the credible evidence shows that this is precisely what he instructed Toney to submit.

Finally, the testimony of Officer Eugene Hyde should be considered before leaving the issue of the alleged ''doctored'' M.V.R. Officer Hyde, a captain with the Georgia Department of Public Safety, was called as a witness by Respondent. Prior to his current assignment, Officer Hyde spent 9 years as the supervisor of that agency's computer records section. During that time, Hyde helped develop the current format used in issuing computer generated M.V.R.'s. Hyde testified that the allegedly altered M.V.R. proffered by Respondent appeared in format to be a document issued by the Georgia Department of Motor Vehicles. Upon analysis of the substantive information contained on that document, Hyde testified that in his opinion it appeared to have been altered or ''doctored.'' I do not for a moment doubt the honesty of that opinion. Further questioning by me of Officer Hyde, however, revealed several discrepancies in the document for which even Officer Hyde could offer no explanation. I am left with the conclusion it is not all that clear that the altered or ''doctored'' M.V.R. was in fact altered or ''doctored.''

What is clear is that even if the proffered M.V.R. was altered or ''doctored,'' it was not necessarily altered by Toney. The proffered M.V.R. on its face purports to be a 7-year M.V.R. Toney denies that this is the M.V.R. which he presented to Respondent with his application. Toney and Hilbish present a logical and credible explanation to support the conclusion that Toney very carefully and intentionally supplied Respondent with only a 3-year M.V.R. Without making a finding to this effect, I agree with counsel for the General Counsel there is the distinct possibility that Respondent, not Toney, altered or ''doctored'' a purported 7-year M.V.R. between the time of its decision on September 4 to discharge Toney and the meeting on September 5 with Hilbish and Toney, where that decision was effectuated, specifically for the purpose of bolstering its decision to discharge Toney. It is both possible and plausible that since Hilbish had been able to force Respondent on September 4 to back off its decision to discharge Leffers and Wyche, someone with Respondent decided that it was not going to have the same result with Toney. It is not necessary to make such a finding, however, and I refrain from doing so. It is sufficient to point out that it is Respondent's burden of proof on this issue. While Respondent has presented evidence from which it weaves what at first blush appears to be a consistent thread establishing that Toney presented Respondent with an altered M.V.R., further and careful analysis shows that Respondent's evidence is not credible, is at times self-contradictory, and in the final analysis is inconclusive. I find that Respondent has failed to carry its burden of proof that Toney presented Respondent with false evidence in support of his employment application.

Finally, before leaving the issue of Toney's discharge, I note considerable evidence establishing that regardless of the asserted reason for discharging Toney, the asserted reasons were pretextual. In this regard, it is important to note again that it was not the allegedly altered M.V.R. which Respondent relied on in making its decision to discharge Toney. Rather, it was Toney's alleged falsification of his employment application by checking ''No'' in the box on his supplemental application which asked whether Toney had ever been convicted of a crime. The ''crime'' which Toney failed to reveal was a DUI violation which appeared on the M.V.R. obtained by and included as a part of the Van Ella report on Toney. The supplemental application at issue contains questions about the applicant's driving record. Every question on that supplemental application except one specifically requests information only for the past 3 years. Only one question is even arguably open-ended, and that is the question to which Toney allegedly gave false information by not revealing a prior DUI. The question asked is whether the applicant has ''ever been convicted of a crime.'' Toney testified he checked ''No'' because he ''didn't know (a DUI) was a criminal offense. I think a criminal offense is somebody that takes drugs, sells drugs, robs somebody, steals cars, murder.'' There is little doubt that in common parlance the word ''crime'' is often associated only with a felony, and traffic violations, unfortunately even including DUI's, are generally not thought of as crimes. Whether a DUI is technically a crime, however, is simply not the issue. The evidence is inescapable that even Respondent treats DUI's rather lightly, for even current drivers who receive DUI violations are not terminated unless their driver's licenses are suspended. Even in such circumstances, Transportation Manager Randy Johnson admits that he tries ''to work with my employees'' so that they might take vacation time or even a medical leave to cover the period of the suspended license.

The record is replete with evidence, not all of which needs to be discussed in every detail, that Respondent reached far to find a reason to discharge Toney while looking the other

way to retain other employees in far worse situations. One such example is the case of Milwood Lowe, who was ultimately terminated, but only after Respondent gave him repeated chances to ''straighten out'' his problems. Lowe was actually arrested by police near Respondent's premises for driving without proof of insurance. Two weeks later, Lowe was still employed by Respondent and still being given an opportunity to ''clear up'' his situation. Only when Lowe failed repeatedly to follow instructions to bring in past citations was a final decision reached to terminate him.

Employee John Beck also answered ''No'' to the question whether he had been convicted of a crime. The Van Ella background report on Beck revealed that he had been convicted of possession of marijuana. Beck, however, was kept while Leffers, Wyche, and Toney were to be discharged. Respondent's purported claim that Beck, like Leffers and Wyche, was protected by the Youthful Offenders Act is belied by the fact that Beck was 22 years old when convicted of this crime as shown on the face of the documents in evidence.

Perhaps the most outrageous example of Respondent covering its eyes for some employees while reaching out to discharge Toney is shown in the case of employee Charlie Heard. Heard, like Hilbish and Toney, was hired on the basis of a 3-year M.V.R. On Heard's supplemental application, Heard had written ''none'' as to tickets received in the past 3 years. A M.V.R. obtained by Respondent during its background investigation showed that Heard had received a suspended license for a DUI conviction which should have shown up even on a 3-year M.V.R. When Assistant Distribution Manager Kemme confronted Heard with this evidence, Heard explained that he had paid a Teamsters official who had promised to have this ticket ''fixed.'' Heard admitted this had been done and therefore he thought it would not appear on his official M.V.R. Kemme took no action whatsoever against Heard for falsification of his application, or for the flagrant dishonesty in ''fixing'' and concealing the DUI. Instead, Kemme had Heard fill out a new page on his job application reflecting the DUI for the first time. Heard was retained, while Toney was discharged.

The conclusion is inescapable that Toney's job application and M.V.R. were scrutinized in every detail in order to find a pretext for discharging Toney. Toney's reasonable explanation concerning why he filled out his application as he did was ignored, while Heard's explanation that he paid off a business agent to fix his DUI conviction was accepted by both Johnson and Kemme. Extenuating factors taken into consideration for others were given no consideration whatever or short shrift for Toney. In short, Respondent has failed at every turn to meet its burden of proof under *Wright Line*, supra. Respondent has not only failed to prove that it would have discharged Toney even in the absence of his union activities, but in fact the opposite conclusion is warranted. I find that Respondent discharged Toney in violation of Section 8(a)(1) and (3) of the Act.

8. September 16: George Lewis' reassignment of work

George Lewis is a senior employee who has worked for Respondent since 1978. During recent years, Lewis was openly outspoken about work-related issues which he thought were important. Lewis did not hesitate to express himself to anyone, including Transportation Manager Randy Johnson and Assistant Distribution Manager Paul Kemme. During 1991, when employees began mobilizing for change in the ranks of union stewards, Lewis joined the activist group. Lewis signed the petition demanding an election of shop stewards; spoke out when drivers met on Respondent's premises on June 23, and thereafter was interrogated first about the meeting, as described above.

Respondent's drivers bid every 6 months on the basis of seniority for desired dispatch times or runs. ''Bid drivers'' go to specific assigned destinations. ''Open mileage drivers'' have specific reporting times, but in theory do not have specific guaranteed destinations. ''Extra board drivers'' handle what is left. There is no dispute about the fact that over a period of time, a practice developed of consistently giving certain runs to some of the ''open mileage drivers'' assigned to report at certain specific times. Two open mileage bids, including ''the Pontiac run,'' developed such consistency that in August 1991 Respondent and the Union agreed in writing to convert them to bid runs when new bids became effective in October.

During the 6-month period prior to October, employee George Lewis was the open mileage driver who had regularly been assigned the ''Pontiac run.'' On September 16, a bid driver whose run was not available that day was brought in to work 5 hours early and assigned to take the Pontiac run. Lewis immediately filed a grievance.[7]

No one disputes the fact that the September 16 reassignment of the Pontiac run originally covered only that day. Further, it is undisputed that once Lewis filed the grievance on September 16 over the reassignment of that run, Lewis was never assigned to drive the ''Pontiac run'' again. Instead, a number of different drivers were assigned the Pontiac run until it became a ''bid run'' in October. Lewis testified credibly that he would occasionally lose the Pontiac run to a bid driver, but that before September 16, he had never lost the Pontiac run to ''extra board drivers'' as he did after that date. The record establishes that other ''open mileage drivers'' whose runs had become consistent by practice continued to enjoy their usual assignments until October, while Lewis was deprived of his.

Respondent does not dispute Lewis' credible testimony that as a result of its refusal to assign Lewis the Pontiac run after September 16, he lost hundreds of dollars in wages until he began a new bid on October 13. Lewis filed a second grievance on September 26 over Respondent's refusal to assign him the ''Pontiac run.'' In response to Lewis' grievances, Respondent simply took the position that they could give Lewis ''any work they wanted to give him at the time he was scheduled to come in,'' and therefore had not violated the contract. However, a simple contractual privilege does not authorize discrimination against employees based on union activities, as proscribed by Section 8(a)(3) of the Act.

Respondent's explanation for refusing Lewis the Pontiac run after he filed the grievance on September 16 is both circuitous and unconvincing. Transportation Manager Randy Johnson attempted on direct testimony to link the denial of the Pontiac run to a change in the time of the run occasioned

[7] Pursuant to the collective-bargaining agreement, bid drivers do have priority if a bid run is canceled. However, they are supposed to be given a run at approximately the same time and involving the same number of hours as the canceled run. Lewis' grievance claimed violation of this contractual provision.

by a change in operations at Pontiac beyond Respondent's control. On cross-examination, however, Johnson admitted that the change in operations in fact had nothing to do with how Lewis was assigned work from September 16 to October 13. In Respondent's posttrial brief, it offers no better defense, arguing simply that it ''strains all credulity to believe . . . the Company discriminatorially assigned or re-assigned work to Lewis.'' I find that counsel for the General Counsel has established a prima facie case that Lewis was removed from his regular duties as a result of filing the grievance on September 16. Respondent has offered no reasonable explanation for its actions which might counter counsel for the General Counsel's prima facie case, and I find that by removing Lewis from his regularly assigned duties, Respondent discriminated against Lewis in violation of Section 8(a)(1) of the Act.

9. September and October 1991: Kemme's interrogation of employees about membership in ''Teamsters for a Democratic Union''

During late September 1991, after Anthony Toney's third step grievance hearing, employees David Leffers and Ken Hilbish had a lengthy conversation with Assistant Distribution Manager Kemme in Kemme's office. The conversation, which lasted almost 3 hours, began just between Leffers and Kemme. Then at some point during the conversation, Hilbish came into the room and remained. Leffers candidly admitted that he could not recall everything that was said in this lengthy conversation. Leffers testified credibly, however, as follows:

> The conversation led towards the Union and then at some point he [Kemme] started talking lower, and as he talked lower, he kept looking at the door and he got up and shut the door and went back and sat down. . . . [Kemme] then said, ''Are you all in T.D.U. [Teamsters For A Democratic Union]?'' Ken [Hilbish] said, ''Not yet.'' and, I didn't say anything.

Hilbish corroborated Leffers that Kemme asked both of them if they were members of Teamsters for a Democratic Union. Hilbish testified credibly Kemme went on to say that although he was sympathetic to things TDU wanted to do to clean up the Union, ''They were really too hard core and radical and they didn't need that kind of stuff around here.'' Kemme then told Hilbish that as a union steward he ''needed to swear allegiance to the people in the office at the union hall now.''

Employee George Lewis testified credibly that in late September or early October, Kemme also questioned him about membership in TDU. Lewis testified that he was called into Kemme's office. Kemme proceeded to question Lewis concerning whether he was happy with his new job bid. After this, Kemme raised the subject of TDU. As Lewis testified, Kemme stated, ''We had black against black, white against black, union member against union member, and we need to put it all behind us and concentrate on Winn Dixie [a competitor].'' Kemme then stated to Lewis that Lewis was ''probably a member of TDU.'' Lewis responded that yes, he was. Lewis then went on to say what a strong union man he was, and explain why he supported TDU.

Union Steward Hilbish testified credibly that several weeks after the lengthy conversation Kemme held with him and Leffers in Kemme's office, Kemme again raised the subject of Teamsters for a Democratic Union. Hilbish testified credibly that on this second occasion, following a grievance session, Kemme stated to Hilbish, ''I know you son of a bitches are TDU.'' Hilbish did not respond.

The credible testimony of employees Hilbish and Leffers shows that on at least one occasion, Assistant Distribution Manager Kemme came right out and interrogated them about their membership in Teamsters for a Democratic Union. Kemme's further comment to Hilbish that Teamsters for a Democratic Union ''were really too hard core and radical and they didn't need that kind of stuff around here'' shows that Kemme was not just engaged in idle conversation. Given Kemme's clear disapproval of TDU and his comment that Hilbish should ''swear allegiance'' to incumbents in the Union, Kemme's interrogation of employees concerning their membership status in that organization was coercive as contemplated by *Rossmore House*, supra. When Kemme got less than a direct answer to his interrogation, he then went on to raise the subject with Lewis and a second time with Hilbish. Although these later conversations did not involve direct interrogation, it is clear from their context that Kemme's statements were designed to illicit a response. In the case of Lewis, Kemme was successful, for Lewis felt obligated to explain and defend himself. I find that in each instance described above, Kemme unlawfully interrogated employees about their internal union activities in violation of Section 8(a)(1) of the Act.

E. *Second Stewards Election and Following Events*

On February 23, 1992, a second shop stewards election was held among Respondent's employees. By this time, the employees desiring stronger representation were thought by Kemme, and undoubtedly by other supervisors of Respondent as well therefor, to be associated with Teamsters for a Democratic Union. Indeed, as the second stewards election approached, a great deal of TDU literature was being posted on employee bulletin boards around Respondent's facilities by employees. It is undisputed that at both the East Point and Bouldercrest facilities, there are general purpose bulletin boards which have customarily been used by employees to post any variety of materials, including ''for sale'' signs, poems, cartoons, and union notices. It began to appear, however, as if TDU literature was being removed almost immediately after being posted.

In March 1992, after the second stewards election, interested employees were still trying to post TDU literature on the general purpose bulletin boards around Respondent's facility. During March, employee Raymond Branch finally approached Supervisor Gary Rampey and asked Rampey why Rampey was taking down TDU literature from the bulletin board. Rampey told Branch that Assistant Distribution Manager Kemme had issued an order that TDU literature be removed immediately when found. Several weeks later, Branch observed Kemme actually removing TDU literature from the bulletin board. When Branch protested, Kemme replied, ''Oh, hell, its just TDU stuff; we'll just leave that up there anyway.'' Union Steward Ken Hilbish testified that at about that same period of time, he observed Transportation Manager Randy Johnson coming out of the employee breakroom

at East Point, where a general purpose bulletin board was located, wadding up some TDU flyers.

Rampey was not called as a witness. Kemme admitted to removing TDU literature from the general purpose bulletin boards. Kemme first attempted to imply that he only removed literature which was out dated, but eventually conceded that he also removed material he deemed ''controversial.'' Kemme admitted that other material, such as ''for sale'' signs, sometimes stay up for 4 to 6 months. I find that by disparately removing TDU literature from general purpose bulletin boards at Respondent's facility, Respondent violated Section 8(a)(1) of the Act. See *NLRB v. Magnavox Co*., 415 U.S. 322 (1974); *Roadway Express*, 279 NLRB 302 (1986).

On March 25, 1992, Respondent held meetings with all of its employees to discuss Respondent's general economic position. Separate sessions were held with several different groups of employees. Four witnesses were presented by counsel for the General Counsel to testify about these meetings, and each attended a separate session. Distribution Manager John Moreau was the principal speaker at each session, although Assistant Distribution Manager Paul Kemme and Transportation Manager Randy Johnson also spoke. There were no written or prepared speeches, and what was said at each meeting was therefor similar but slightly different. Counsel for the General Counsel contends that in each meeting, Moreau told employees in similar words that a new freezer facility which had been planned for Atlanta had been placed ''on hold'' because of employees' union activities. Counsel for the General Counsel contends that these statements to employees, not the failure to build the freezer facility itself, violated Section 8(a)(1) of the Act because they blamed employees' union activities for Respondent's failure to build the freezer.

Employee/Union Steward Ken Hilbish testified that at the session he attended, Moreau told employees that a new, large freezer facility had previously been approved for Atlanta, but had been put ''on hold'' pending the outcome of union unrest and labor disputes ''everywhere in the Kroger system.'' Employee John Wood testified that in the session he attended, Moreau attributed the freezer being put ''on hold'' to ''friction.'' According to Wood, Moreau also told employees, ''I'm pissed,'' and that the cartoons discussed above had ''really made him mad.'' According to Wood, Kemme spoke up and added that there were only 600 distribution employees, but 19,000 store employees. Kemme then said, ''Don't think for a minute that they can't get supplied by someone else.'' Kemme then told employees they ''needed to be Krogerites and not unionists.''

Employee Tim Floyd testified that in the session he attended, Moreau told employees he was upset because the freezer facility had been approved, complete with an ice-making unit, ''but that Cincinnati put it on hold due to labor unrest, not specifically in Atlanta but in the country as a whole.'' Floyd testified that in this session, like in Wood's session, Kemme then added that Respondent was not going to let 173 drivers dictate the policy for 19,000 employees. Finally, employee George Lewis testified that in the session he attended, Moreau told employees not only that the freezer had been approved, but that there was money for it, but that the freezer had nevertheless been put ''on hold'' because of contract union activities in Atlanta and throughout the system. Lewis testified credibly that Moreau also told employees frankly, he did not like that, and, ''All I have to say is if you don't like it here, quit.''

Respondent did not call Distribution Manager Moreau as a witness. Instead, it called only Assistant Distribution Manager Kemme to testify both to what he said and to what Moreau said. Kemme admitted Moreau told employees that Respondent's relationship with the Union was a reason for putting building of the freezer ''on hold.'' Kemme asserted, however, that other reasons were also given, including uncertainty about the economy and about competition. I have serious doubts about Kemme's testimony, particularly in view of the fact that Respondent did not bother to call Moreau to give his version of what he said to employees. Union Steward Ken Hilbish testified credibly on rebuttal that the only reason given by Moreau for putting the freezer on hold was labor problems. Hilbish explained credibly that at Moreau's meeting with employees, the economy was discussed, but not as one of the reasons why the freezer was put on hold.

I have little doubt that the general state of the economy played a role in Respondent's decision to place building of the freezer on hold. However, I credit employee witnesses, including specifically Ken Hilbish, in finding that this was not a reason given by Respondent at the meeting with employees on March 25. At that meeting, Moreau simply placed blame for the freezer being put on hold on union unrest, friction, and labor disputes. Moreau expressed clear and unequivocal anger, telling employees he was ''pissed,'' and that if employees did not like working for Respondent, they should quit. In its posttrial brief, Respondent argues that since the Union's contract with Respondent did not expire until September 1992, ''It is difficult to discern any coercive impact such comments could have on these employees.'' Counsel for the General Counsel argues that Moreau threatened loss of jobs and other reprisals. While Moreau's comments to employees did not expressly threaten loss of jobs, I find that they were both intended to be, and were, threatening and coercive to employees in violation of Section 8(a)(1) of the Act. Moreau's comments blamed employee union activities and labor unrest for Respondent not building the freezer in Atlanta. Moreau's expression of anger and his telling employees that if they were not happy, they should quit constituted an implied threat of reprisal. For both reasons, I find that Moreau's comments violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, The Kroger Co., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local No. 528, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interrogated employees about their concerted activity, threatened them with discharge and written warnings for engaging in such concerted activity, issued discipline to employees for engaging in such concerted activity, and threatened employees with discharge for posting cartoons challenging the relationship between incumbent union steward and Respondent's management, and Respondent thereby violated Section 8(a)(1) of the Act.

4. Respondent instituted new procedures for background checks of employees in retaliation against employees for electing new and more active union stewards, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

5. Respondent impliedly threatened to discharge employee Anthony Toney for filing a grievance pursuant to the collective-bargaining agreement between Respondent and the Union, and for engaging in other concerted activities, and Respondent thereby violated Section 8(a)(1) of the Act.

6. Respondent threatened reprisal against employees in retaliation for a grievance filed by employee David Leffers, and Respondent thereby violated Section 8(a)(1) of the Act.

7. Respondent engaged in a disparate prohibition of talk concerning the Union and work-related matters by employees, while other general conversation was allowed, and Respondent thereby violated Section 8(a)(1) of the Act.

8. Proof is not sufficient to establish that Respondent unilaterally restricted access to its offices and to use of telephones and office equipment without notifying the Union or giving it an opportunity to bargain about such matters, and that allegation is hereby dismissed from the complaint.

9. Respondent stated an intention to discharge David Leffers and Eddie Wyche as retaliation against them for engaging in protected concerted activities, and Respondent thereby violated Section 8(a)(1) of the Act.

10. Respondent discharged Anthony Toney in retaliation against him for engaging in protected concerted and union activities, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

11. Respondent removed employee George Lewis from his regularly assigned duties in retaliation against Lewis for filing a grievance pursuant to the collective-bargaining agreement between Respondent and Union, and Respondent thereby violated Section 8(a)(1) of the Act.

12. Respondent interrogated employees about their internal union activities, including their membership in Teamsters for a Democratic Union, and Respondent thereby violated Section 8(a)(1) of the Act.

13. Respondent disparately removed Teamsters for a Democratic Union literature from general purpose bulletin boards at Respondent's facility, and Respondent thereby violated Section 8(a)(1) of the Act.

14. Respondent blamed employees' union and concerted activities for its decision not to build a new freezer facility, and impliedly threatened employees with loss of jobs for engaging in concerted and union activities, and Respondent thereby violated Section 8(a)(1) of the Act.

15. The unfair labor practices which Respondent had been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, The Kroger Co., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their concerted activities, threatening employees with discharge and written warnings for engaging in concerted activity, issuing discipline to employees for engaging in concerted activity, and threatening employees with discharge for posting cartoons challenging the relationship between incumbent union stewards and Respondent's management.

(b) Instituting new procedures for background checks of employees in retaliation against employees for electing new and more active union stewards.

(c) Threatening or impliedly threatening discharge or other reprisals against employees in retaliation against them for filing grievances pursuant to the collective-bargaining agreement between Respondent and the Union.

(d) Disparately prohibiting talk concerning union and work-related matters by employees.

(e) Discharging, attempting to discharge, or stating an intention to discharge employees as retaliation against them for engaging in protected, concerted, and union activities.

(f) Removing employees from regularly assigned duties in retaliation against them for filing grievances pursuant to the collective-bargaining agreement between Respondent and the Union.

(g) Interrogating employees about their internal union activities, including their membership in Teamsters for a Democratic Union.

(h) Disparately removing Teamsters for a Democratic Union literature from general purpose bulletin boards at Respondent's facility.

(i) Blaming employees' union and concerted activities for its decision not to build a new freezer facility, and impliedly threatening employees with loss of jobs for engaging in concerted and union activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from the file of employee Allen Watkinson the discipline issued to him, and disciplinary records of any kind issued to any other employees, for attending the employee meeting held at Respondent's facility on June 23, and notify them in writing that this has been done, and that evidence of the unlawful discipline against them will not be used as a basis for future personnel action against them.

(b) Offer Anthony Toney immediate and full reinstatement to his former position or, if that position no longer exists, to

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(c) Make whole Anthony Toney and George Lewis for any loss of earnings or benefits they may have suffered by reason of the discrimination against them by paying him a sum of money equal to the amount they normally would have earned from the date of said discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Expunge from its files any reference to the discharge of Anthony Toney and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(f) Post at its Atlanta, Georgia distribution center facilities copies of the attached notice marked ''Appendix.''[9] Copies of the notices, on forms provided by the Regional Director for Region 10, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their concerted activities, threaten employees with discharge and written warnings for engaging in concerted activity, issue discipline to employees for engaging in concerted activity, or threatening employees with discharge for posting cartoons challenging the relationship between incumbent union stewards and Respondent's management.

WE WILL NOT institute new procedures for background checks of employees in retaliation against employees for electing new and more active union stewards.

WE WILL NOT threaten or impliedly threatening discharge or other reprisals against employees in retaliation against them for filing grievances pursuant to the collective-bargaining agreement between Respondent and the Union.

WE WILL NOT disparately prohibit talk concerning union and work-related matters by employees.

WE WILL NOT discharge, attempt to discharge, or state an intention to discharge employees as retaliation against them for engaging in protected, concerted, and union activities.

WE WILL NOT remove employees from regularly assigned duties in retaliation against them for filing grievances pursuant to the collective-bargaining agreement between Respondent and the Union.

WE WILL NOT interrogate employees about their internal union activities, including their membership in Teamsters for a Democratic Union.

WE WILL NOT remove Teamsters for a Democratic Union literature from general purpose bulletin boards at our facilities.

WE WILL NOT blame employees' union and concerted activities for its decision not to build a new freezer facility, and impliedly threatening employees with loss of jobs for engaging in concerted and union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL expunge from the file of employee Allen Watkinson the discipline issued to him, and disciplinary records of any kind issued to any other employees, for attending the employee meeting held at our facility on June 23, and notify them in writing that this has been done, and that evidence of the unlawful discipline against them will not be used as a basis for future personnel action against them.

WE WILL offer Anthony Toney immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make whole Anthony Toney and George Lewis for any loss of earnings or benefits they may have suffered by reason of the discrimination against them by paying him a sum of money equal to the amount they normally would have earned from the date of said discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with appropriate interest.

WE WILL expunge from our files any reference to the discharge of Anthony Toney and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

THE KROGER CO.